United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7216

To be argued by
BENJAMIN E. HALLER

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH NAVIGATION CORP.,

Plaintiff-Appellee,

—against—

ARTHUR HENRY CHESTER, EDINBURGH ASSURANCE CO., LTD., STUYVESANT INSURANCE COMPANY, THREADNEEDLE INSURANCE COMPANY,

Defendants-Appellants,

AMETCO SHIPPING, INC.,

Intervening Plaintiff.

On Appeal From The United States District Court For The Southern District of New York

BRIEF FOR PLAINTIFF-APPELLEE

HILL, BETTS & NASH
Attorneys for Plaintiff-Appellee
One World Trade Center
Suite 5215
New York, New York 10048
(212) 466-4900

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STATUTE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH NAVIGATION CORP., :

Plaintiff, :

-against-

72 Civ. 391 (KTD)

ARTHUR HENRY CHESTER, et al., :

Defendants, :

-and-

AMETCO SHIPPING INC., :

Intervening Plaintiff. :

- -x

BRIEF FOR PLAINTIFF-APPELLEE

COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Was the District Court's finding that the sole proximate cause of the grounding was the negligence of the master, an insured peril, clearly erroneous?

2. Under the policies in suit, do unseaworthiness or lack of diligence constitute a defense in the absence of proof that they contributed to the loss?

3. Was the District Court's finding that the alleged unseaworthiness of the vessel could not have contributed to the grounding clearly erroneous?

STATEMENT OF THE CASE

Plaintiff shipowner and intervening plaintiff mortgagee sue defendant underwriters in admiralty to recover, under certain policies of marine insurance, the insured value of the steamship JOSEPH H ($375,000) with interest, for the vessel's constructive total loss resulting from her stranding in the St. Lawrence River on October 3, 1969. Following trial in the Southern District of New York on June 9, and 10, 1975 before the Hon. Kevin Thomas Duffy, the trial court filed its opinion on December 30, 1975 (unreported, R. 115-124) finding that the sole cause of the stranding and resulting loss was the negligence of the master, an insured peril, that the loss was not caused or contributed to by the alleged unseaworthiness of the vessel or by any alleged want of diligence on plaintiff's part, and that there was a constructive total loss. Defendants appeal from judgment entered against them and in favor of intervening plaintiff (R. 125), in accordance with the mortgagee clause of the policies (R. 296), for the face amount of the policies with interest.

STATEMENT OF THE FACTS

The JOSEPH H, of Liberian registry, was owned by plaintiff, a Liberian corporation, and was classified by Bureau Veritas, having most recently been examined by a Bureau Veritas surveyor on September 21, 1969 at Milwaukee. She was insured under policies of insurance subscribed by defendants and other insurers embodying the American Institute Time (Hulls) clauses which define the insured perils in relevant part as follows:

> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, & c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement ***.
>
> "And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

"This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:

* * *

"Negligence of Master, Mariners, Engineers or Pilots;

provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel." (R. 294)

The policies valued the vessel at $300,000. Additional "increased value" coverage (applicable only in case of actual or constructive total loss) was provided in the amount of $75,000. Each of the subscribing insurers has agreed to be bound, for its proportionate share, by any judgment recovered herein against the representative insurers who have been named as defendants (Complaint and Answer, Par. 4, R. 5, 7).

On October 2, 1969, while outbound, proceeding down the St. Lawrence River, the vessel anchored in the vicinity of Bic Island to repair the main circulating pump. At 0600 hours on October 3, the repairs having been effected, the bridge watch was assumed by Capt. Carlos Cabezas. The log indicates that there was then dense fog.

At 0615 the anchor was weighed and the vessel proceeded in foggy weather. At 0730 the log indicates that the vessel was aground in the vicinity of Bic Island. Efforts to free the vessel from the strand using her own power were unsuccessful. Salvage assistance was obtained, a portion of the cargo was lightered and the vessel was towed first to Tadoussac, arriving there on October 7, and finally to Quebec where she arrived on October 10 (R. 290-1).

On December 5, 1969, while the vessel still lay at Quebec, plaintiff tendered abandonment to underwriters which was refused (R. 291).

The Master was hospitalized at Quebec on October 17, 1969 and died a few weeks thereafter (R. 291). His testimony was not taken.

The most direct evidence of the cause of the loss is the vessel's deck log for October 3, 1969, plaintiff's Exhibit 6. The mate, Ladefoged, identified the slanting script appearing in the log as his own handwriting and the more nearly vertical handwriting, or block letters, as having been made by Captain Cabezas (Exhibit 6; Ladefoged, R. 189-190). The first entry made by Ladefoged in the "Remarks" section when he came on watch at midnight (0000) was "Anchored at entrance to Bic Channel". He checked the anchor position just after midnight and noted it in the log (R. 190-1). He was relieved by the captain at 6 o'clock at which time the vessel was still at anchor

and his last entry was "0600 dense fog" (R. 193-4).

The first entry in the captain's handwriting in the "Remarks" section is "0615 - foggy - heave [symbol of an anchor] & proceed". On the left hand page of the log for the same period of time, under the column headed "Hour", there is inserted a short diagonal line and the figure 15 in the upper right corner of the box corresponding to 7:00 o'clock. Ladefoged interpreted this notation as indicating 6:15. On the corresponding line the entry "105" in the column headed "Steer" he interpreted as indicating that on getting under way at 0615 the captain's intention was to steer 105° on the steering compass (R. 201-2).

The next log entry in the "Remarks" section reads "0730-run aground" followed by abbreviations apparently indicating engine movements full astern and full ahead. These entries had been made by the captain by the time Ladefoged reached the bridge, a few minutes after 7:30, having been wakened by the jar of the grounding when "it hit very hard" (R. 195-1).

Although the captain died a few weeks later there is no evidence that his faculties were impaired at or before the time of the stranding or that plaintiff knew or could have known of his illness. To Ladefoged he seemed in good health and appeared to be competent and to know his business (R. 153). He had not complained

about being ill. He had apparently been sleeping during the period before coming on watch (R 166). Ladefoged observed nothing unusual about his condition when he came on watch just before six o'clock (R. 194).

Stamatiadi, who had frequent contact with Captain Cabezas both before and after the stranding, testified at the trial that the captain appeared to know his business, that he did not appear to be suffering from any physical defects or to be confused or disoriented. He did not complain of not feeling well. "He was a big, huge, healthy man" (R. 51-53).

The main thrust of underwriters' defense is that the vessel was ill-equipped and undermanned. No evidence was produced that these factors had any causal relations to the loss. As to equipment, (lack of operable radar and echo sounder), nothing in the policies required the vessel to have such devices and there was no evidence that plaintiff represented the vessel to be so equipped. There was no proof that the master relied on either the radar or the echo sounder or even that these devices had ever been operational from the time plaintiff acquired the vessel.

As to undermanning, there was nothing more than speculation that the master's competence may have been impaired by fatigue and this was refuted by the mate's and engineer's affirmative testimony.

(The contention that the vessel did not become a constructive total loss has been abandoned. Reference to the evidence on this point is therefore omitted.)

ARGUMENT

I. THE FINDING THAT THE LOSS WAS CAUSED BY AN INSURED PERIL, THE MASTER'S NEGLIGENCE, WAS NOT CLEARLY ERRONEOUS.

It is a settled rule of construction of marine insurance policies that the cause nearest to the loss is determinative. In Queen Insurance Company of America v. Globe & Rutgers Fire Insurance Company, 263 U.S. 487 (1923), the Supreme Court said:

> On the other hand the common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like (492).

The evidence compels the conclusion that after assuming the watch the captain, notwithstanding the prevailing dense fog, elected to heave anchor and proceed by dead reckoning on an easterly heading through Bic Channel, with the intention of alerting course to the northeast after clearing Bic Island and then continuing down the

St. Lawrence River. The vessel failed to clear the reef at the east end of the island at the position noted on the chart (Plaintiff's Exhibit 8; R. 204).

Whether the captain failed to select and maintain the proper heading or headings, or miscalculated his speed, is immaterial. In either case the immediate cause of the stranding was clearly the captain's navigational error. The same conclusion follows if the captain was initially negligent in deciding to proceed in dense fog with the navigational aids available to him. Ladefoged's conclusion that "The captain simply made a mistake" is inescapable (R. 206).

"Negligence of master" is an insured peril specifically defined in the so-called Inchmaree clause, the purpose of which "is to broaden not restrict, to expand, not withdraw, coverage". Saskatchewan Government Ins. Office v. Spot Pack, Inc., 242 F.2d 385, 391 (5th Cir., 1957).

As appears from the evidence above cited (pp. 5 - 7) the trial court's finding "[t]hat the grounding of the JOSEPH H was proximately caused by the negligence of the Master, Mariners, Engineers or Pilots ***" (R. 121) is fully supported and not "clearly erroneous". FRCP 52(a).

It may be redundant to add that the record equally supports the conclusion that the loss resulted

from an insured peril under the "perils of the sea" clause as a stranding is insured as a "peril of the sea" irrespective of negligence of master or crew. Liverpool v. G. W. Steam Co., v. Phenix Ins. Co., 129 U.S. 397 (1889).

II. UNSEAWORTHINESS OR LACK OF DILIGENCE NOT SHOWN TO HAVE CONTRIBUTED TO THE LOSS ARE NOT A DEFENSE.

The proviso of the Inchmaree clause relating to diligence by its plain language requires a causal connection between want of due diligence on the part of the assured, etc., and the loss in order to except the loss from the specific coverage of "Negligence of Master, Mariners, Engineers, or Pilots".

Where the loss had demonstrably occurred through an insured peril, stranding or master's negligence, coverage is not avoided under the form of policy here used by proof of unseaworthiness without more. The policies contain no express warranty of seaworthiness. There is likewise no unqualified implied warranty. In Saskatchewan Government Ins. Office v. Spot Pack, Inc., 242 F.2d 385 (5th Cir., 1957), the Court of Appeals for the Fifth Circuit, dealing with a similar policy form, described the so-called implied warranty as follows:

> "It is not that the vessel shall continue absolutely to be kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departing from each port during the policy term. It is, rather, stated in the negative that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. And, unlike a breach of warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness." (388) (Emphasis added.)

The Court went on to hold that, the loss having been shown to have resulted from an insured peril, the insurer had the burden of proving not only unseaworthiness but that such unseaworthiness was the cause of the loss. Upon failing to sustain this burden the insurer remained liable (389).

To be distinguished are such cases as Smith v. Northwestern F & M Ins. Co., 246 N.Y. 349, 159 N.E. 87 (1927), where the policy involved, unlike those here at issue, contained an express warranty that "at all times during the continuance of this policy" the vessel should meet certain standards (Id. at 354-355), a fact which proved central to the court's decision (Id. at 358). Concerning so-called implied warranties, Judge Cardozo recognized the same rule later expressed in the Saskatchewan case:

"Indeed, the breach of the implied warranty does not even suspend the risk, in the absence of a causal relation between breach and loss.

III. THE FINDING THAT THE ALLEGED UNSEAWORTHINESS OF THE VESSEL COULD NOT HAVE CONTRIBUTED TO THE GROUNDING WAS NOT CLEARLY ERRONEOUS.

Whether the vessel's complement of deck officers complied with applicable Liberian regulations has no relevance in determining the cause of the loss. Arguably the case might have been different if under-manning had resulted in an unqualified person being in charge of navigation at the critical period, but that is not this case. Nothing in the regulations requires more than one competent, duly licensed deck officer to be on watch at any given time. Captain Cabezas was such an officer; there is unrebutted proof that he was competent and not disabled, and no evidence that plaintiff could have discovered by diligence that he was not fully qualified. With the vessel's navigation in his personal care, there is no reason to suppose that the presence on the vessel of additional licensed officers, off-duty and in their bunks, could have affected the result.

Accepting arguendo the contention that an assured asserting its rights under a policy faces the same burden of proof that The Pennsylvania, 86 U.S. 125, 19 Wall. 125

(1873) imposes on a party seeking to avoid tort liability, the trial court found:

> There was no one more qualified to take the JOSEPH H through the Bic Channel on the basis of dead reckoning than the master of the vessel. The fact that he was starting on a six hour watch had no bearing whatsoever on his competence at that time. Indeed, it would appear that the master of the vessel was fully rested when he ordered the crew to weigh anchor and proceed through the channel. Even if the most restrictive view of the rule set down in The Pennsylvania, supra, be considered as applicable in this case, I find that the alleged unseaworthiness of the ship in this area could not have in any way contributed to the stranding and the resultant loss of the ship (R. 122).

This finding is fully supported by the evidence summarized above, pp. 5-7.

If, as plaintiff contends, the rule of The Pennsylvania, has no proper application in the present context, the trial court's finding is justified a fortiori. The only authority cited in appellants' brief for the application of this rule in an insurance context is Richelieu & O. Nav. Co. v. Boston Marine Insurance Co., 136 U.S. 408 (1890) where the policy, unlike those in suit, specifically excluded damage caused by "want of ordinary care and skill in navigating said vessel". The parties having, in effect, agreed to exclude losses caused by the assured's servants' tortious conduct, it was not surprising that the court should have cited principles of maritime tort law in support of its conclusion.

Applying The Richelieu dictum to a case invoking an entirely different form of contract is a non sequitur.

The irrelevence of the question of radar to the issues here presented is established by three incontrovertible propositions:

1. The policies contain no requirement that the vessel be equipped with a functioning radar.

2. There is no evidence that plaintiff, or anyone authorized to speak for plaintiff, represented to underwriters that the vessel was so equipped.

3. There is no evidence that the captain thought the radar was operative, or that he relied on it; hence the casualty could not have been contributed to by any radar malfunction.

The first proposition is established by the contents of the specimen policy received in evidence as plaintiff's Exhibit 2, (R. 293-6).

The second proposition is established negatively by defendants' failure to assert any defense of misrepresentation in their answer (R. 6-8).

The third proposition is confirmed by the testimony of defendants' radar expert, Murphy, who, on the basis of his examination of the radar unit after the stranding, estimated that it had been out of service for "a couple of years" (R. 238), i.e., since before plaintiff's acquisition of the vessel on November 1, 1968 (Stipulation of

Facts, R. 288).

Defendants, over plaintiff's objection, offered as defendants' Exhibit I a page from the Register of Bureau Veritas purporting to show that the vessel was equipped with radar (R. 86-8). Plaintiff submits that this exhibit is of no probative value and should be excluded for the following reasons:

First, there has been no proof that the Bureau Veritas Register entry was procured by authorized by or even known to plaintiff. Second, there is no evidence that defendants relied on the Bureau Veritas Register entry in writing the insurance policies or that plaintiff had any reason to believe that they were so relying.

Captain Hard's testimony that he considered radar, among other things, an essential aid to navigation (R. 96) has no bearing on the terms of the insurance contracts between the parties. No proposition of law has been cited that only vessels equipped with the latest improvements are insurable.

What has been said as to radar applies equally to the fact that the vessel was not equipped with a functioning fathometer or with a gyrocompass. As to the vessel's magnetic compasses, there is no evidence that they were not serviceable. Captain Hard testified that on such a voyage as the passage from the St. Lawrence through the lakes to Milwaukee and back the opportunity

would exist to check the deviation of the magnetic compass on various headings against observable check-points (R. 106). Ladefoged testified that he had used them for navigation, that he checked them by reference to check-points while navigating the river and that "I am sure they were OK" (R. 177).

As the trial court properly held:

> If the defendants wish to include the requirement of latter-day technology, then the policy of insurance should have so provided (R. 123).

The court's finding renders irrelevant defendants' elaborate indictment of the vessel's unseaworthiness and of plaintiff's lack of diligence in the light of the rule that "the consequence of a violation of this 'negative' burden is merely a demand of liability for loss or damage caused proximately by such unseaworthiness". Saskatchewan v. Spot Pack, Inc., supra. at 388.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

HILL, BETTS & NASH

Benjamin E. Haller,

Of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Barbara Richards being duly sworn deposes and says: That on the 12th day of August 1976, she served the attached

Brief for Plaintiff-Appellee

upon Symmers, Fish & Warner

the attorney for the Defendant-Appellant

named therein, at 345 Park Avenue
New York, New York 10022

by depositing two true copies thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government at One World Trade Center, New York, New York 10048, directed to said attorney at the last business address within the State designated by said attorney for that purpose upon the preceding papers in this action. Deponent is over the age of eighteen years.

Barbara Richards

Sworn to before me
this 12th day of
August 1976.

Thomas M. Hoey Jr.

THOMAS M. HOEY JR.
Notary Public, State of New York
No. 24-6925900 Qual. in Kings County
Certificate filed in New York County
Commission Expires March 30, 1978